

Working Together¹ While “Waltzing in a Mine Field”²: Successful Government Construction Contract Dispute Resolution with Partnering and Dispute Review Boards

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I. INTRODUCTION

*“Coming together is a beginning; keeping together is progress; working together is success.”*³

“Coming together” is the easy part of a construction project, but many parties involved in a construction project have a difficult time “keeping together” and “working together.”⁴ Failure to keep a government construction project together results in complex and time-consuming litigation of contract disputes where the government is a party.⁵ For example, construction contract cases typically take three to four years to resolve.⁶ Because it is difficult to keep together and work together during a construction project, resolving disputes as they *arise*⁷ during the

¹ See *Building Success for the 21st Century* (visited Jan. 15, 2000) <http://www.adr.org/guides/partnering_guide.html>.

² The following quotation exemplifies the difficulties involved in construction projects: “Participating in a complex construction project is like waltzing in a mine field.” Paul J. Geller, *When the Walls Come Crumbling Down: A Call for ADR in the CIC*, CONSTR. LAW., Jan. 1993, at 12, 12 (quoting Robert Coulson, *From the President of the American Arbitration Association*, 44 ARB. J., 2 (1989)).

³ *Building Success for the 21st Century* (visited Jan. 15, 2000) <http://www.adr.org/guides/partnering_guide.html>.

⁴ *Id.*

⁵ See Maria R. Lamari, *The Role of Alternative Dispute Resolution in Government Construction Contract Disputes*, 23 HOFSTRA L. REV. 205, 206 (1994); see also Eldon H. Crowell & Charles Pou, Jr., *Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute Resolution Techniques*, 49 MD. L. REV. 183, 183 (1990) (indicating that contractors, agency officials, government attorneys, and others agree that government contract appeals are too complicated, expensive, and time consuming).

⁶ See Senator Charles E. Grassley & Charles Pou, Jr., *Congress, the Executive Branch and the Dispute Resolution Process*, 1992 J. DISP. RESOL. 1, 17.

⁷ Resolving disputes as they arise is a new alternative dispute resolution (ADR) trend in the public and private construction industry. See CPR INST. FOR DISPUTE RESOLUTION, CONSTRUCTION INDUSTRY ADR I-72 (1994). In the 1980s the trend for

construction project is an important factor to consider when creating an effective dispute resolution procedure.⁸

Both the public and private sectors have responded to the need to resolve problems as they *arise* during the construction project.⁹ The federal government currently focuses on *preventing* disputes through a teamwork environment.¹⁰ This teamwork concept is known as “partnering.”¹¹ Despite the fact that partnering is a dispute prevention technique, not an alternative dispute resolution (ADR)¹² technique, many parties think partnering is all the ADR needed on a construction project.¹³ Partnering, however, is not a

government or private dispute resolution was litigation. *See* Robert A. Rubin & Bettina Carbajal-Quintas, *Drafting Construction Contracts and Handling Construction Litigation 1993: Preparing for the “New” Public and Private Works*, in ALTERNATIVE DISPUTE RESOLUTION 1993, at 439, 441 (PLI Real Estate Practice Course Handbook Series No. N-391, 1993). In the 1990s arbitration gained popularity. *See id.* at 442. Arbitration gained so much popularity that the American Arbitration Association (AAA) created standardized Construction Industry Dispute Resolution Procedures. The most recent update of these procedures became effective January 1, 1999. *See American Arbitration Association Construction Industry Dispute Resolution Procedures (Including Mediation and Arbitration Rules)* (visited Jan. 14, 2000) <http://www.adr.org/rules/construction_rules.html>. For a summary of the significant changes to the AAA Construction Industry Dispute Resolution Procedures, *see Summary of Significant Changes to the AAA’s Construction Industry Dispute Resolution Procedures* (visited Jan. 14, 2000) <http://www.adr.org/rules/construction_summary.html>. Now, within the federal government, parties clearly have moved away from arbitration and are focused on resolving disputes as they arise. *See* Rubin & Carbajal-Quintas, *supra*, at 441.

⁸ *See* CPR INST. FOR DISPUTE RESOLUTION, *supra* note 7, at 441–42.

⁹ *See* James P. Groton, *Alternative Dispute Resolution in the Construction Industry*, DISP. RESOL. J., Summer 1997, at 49, 50.

¹⁰ *See id.* at 50.

¹¹ For further discussion of partnering, *see supra* Part III.

¹² ADR, expansively defined, includes any method of dispute resolution short of litigation on the merits. *See* Major Patrick E. Tolan, Jr., *The Role of Alternative Dispute Resolution in Resolving Air Force Contract Disputes*, 40 A.F. L. REV. 89, 91 (1996). Traditional ADR processes include mediation, arbitration, early neutral evaluation, and summary jury trial. Partnering and dispute review boards are nontraditional ADR processes. *See* BETTE J. ROTH ET AL., THE ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE §§ 1:5, :8 (1998). This Note will not discuss the above major traditional ADR processes.

¹³ *See, e.g.,* Allen L. Overcash, *The Truth About Partnering Limitations and Solutions* (visited Jan. 14, 2000) <<http://www.adr.org/pl/plv21n02-1.html>> (explaining serious deficiencies of partnering and stating that “[p]artnering clearly has been oversold as a cure for construction disputes”).

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“miracle cure,”¹⁴ and a significant disadvantage of partnering is that many disputes cannot be resolved “during the course of the construction project”¹⁵ because partnering does not provide for an active intermediary or decisionmaker.¹⁶

This Note addresses two primary issues. First, this Note addresses the general lack of awareness about federal agency dispute prevention and resolution in the construction industry.¹⁷ Second, this Note criticizes the “miracle cure” mentality toward partnering and emphasizes the importance of using partnering in conjunction with a dispute resolution procedure, dispute review boards (DRBs). The following Parts are provided to educate the reader about government construction dispute prevention and dispute resolution. Additionally, the following Parts are provided to convince the reader that government construction contract disputes should be resolved with partnering *and* DRBs. Part II of this Note discusses federal legislation that applies to construction contract disputes. Part III defines partnering and DRBs. Furthermore, Part III stresses the need to use partnering in conjunction with DRBs for effective dispute resolution. Part IV provides recommendations to ensure that the government and contractors use partnering in conjunction with DRBs. Finally, Part V reiterates the importance of using partnering with DRBs. Part V concludes by explaining that continuing education in the area of government construction dispute resolution will promote increased federal and state government use of the above mechanisms.

II. FEDERAL ALTERNATIVE DISPUTE RESOLUTION LEGISLATION THAT APPLIES TO GOVERNMENT CONSTRUCTION CONTRACT DISPUTES

Congress has recognized the need for ADR in certain areas since the 1920s,¹⁸ but only recently has Congress recognized the need for ADR in

¹⁴ *Building Success for the 21st Century* (visited Jan. 15, 2000) <http://www.adr.org/guides/partnering_guide.html> (noting that partnering was adopted too completely and quickly throughout the construction industry).

¹⁵ CPR INST. FOR DISPUTE RESOLUTION, *supra* note 7, at I-72. Resolving disputes as they occur “during the course of the construction project” is frequently called “jobsite ADR.” *See id.*

¹⁶ *See* Allen L. Overcash, *The Truth About Partnering Limitations and Solutions* (visited Jan. 14, 2000) <<http://www.adr.org/pl/plv21n02-1.html>>.

¹⁷ *See* Frank Carr et al., *The Untapped Potential of ADR in the Construction Industry*, FED. LAW., June 1995, at 32, 37.

¹⁸ *See* Grassley & Pou, *supra* note 6, at 10. Congress’s first official recognition of ADR was with the Federal Arbitration Act. *See* 9 U.S.C. §§ 1–16 (1994). This Act,

construction contracts disputes.¹⁹ Despite Congress's enactment of ADR statutes applicable to construction disputes, many construction firms lack knowledge about federal ADR legislation.²⁰ Subparts A and B discuss federal legislation applicable to government construction contract ADR.

A. *The Contract Disputes Act*

The Contract Disputes Act of 1978 (CDA)²¹ was the federal government's first attempt to use ADR in the government contract setting. The purpose of the CDA is to resolve government contract disputes through negotiation rather than litigation.²² All government contracts entered into after March 1, 1979 are still governed by the CDA regulations, but the contracting parties may use other ADR techniques as alternatives to negotiation.²³ Resolving a construction dispute under the CDA begins with the contracting officer. The contracting officer is an agency official whose primary function is to enter into and administer government contracts.²⁴ Any claim²⁵ that results from the construction contract must be presented to the contracting officer.²⁶ The CDA requires the officer to issue a written

passed in the 1920s, recognized ADR as an appropriate method to resolve, inter alia, commercial, labor, and international disputes. See Grassley & Pou, *supra* note 6, at 10.

¹⁹ See Thomas J. Stipanowich, *Beyond Arbitration: Innovation and Evolution in the U.S. Construction Industry*, 31 WAKE FOREST L. REV. 65, 82 (1996) [hereinafter Stipanowich, *Beyond Arbitration*]. For a summary of Stipanowich's *Beyond Arbitration*, see Thomas J. Stipanowich, *Construction ADR Undergoes a Sea Change*, 14 ALTERNATIVES TO HIGH COST LITIG. 69, 78 (1996). Until the 1980s the only alternative to litigation was through private agreement between the parties involved in the construction dispute. Now it is likely that some type of legislative form will direct parties to participate in an ADR procedure. See *id.* Congress has recognized ADR over the last 20 years, but few agencies have promoted ADR. See Thomas N. Palmer, *Strengthening Federal Agency Mediation in Public Sector Disputes: A Model from Historic Preservation*, 7 OHIO ST. J. ON DISP. RESOL. 369, 369 (1992).

²⁰ See Carr et al., *supra* note 17, at 37.

²¹ 41 U.S.C. §§ 601–613 (1994); see also LUTHER P. HOUSE ET AL., AVOIDING AND RESOLVING CONSTRUCTION CLAIMS AND DISPUTES 330 (1997). For further discussion of the CDA, see Crowell & Pou, *supra* note 5, at 188–91.

²² See Lamari, *supra* note 5, at 211.

²³ See AMERICAN ARBITRATION ASS'N, A PRACTICAL GUIDE TO RESOLVE CONSTRUCTION DISPUTES 203 (1994).

²⁴ See Crowell & Pou, *supra* note 5, at 189.

²⁵ "Claim" refers to a formal claim. Parties can try to resolve disputes informally without using the contracting officer. See *infra* Part III.B.2.

²⁶ See Crowell & Pou, *supra* note 5, at 189.

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decision if the dispute is not resolved amicably, and, if a contractor is not satisfied with the contracting officer's decision, the claim may be appealed to an agency Board of Contract Appeals (BCA)²⁷ or the United States Court of Federal Claims.²⁸

B. The Administrative Dispute Resolution Act of 1990 and the Administrative Dispute Resolution Act of 1996

Eleven years after Congress enacted the CDA, Congress enacted the Administrative Dispute Resolution Act of 1990²⁹ (ADRA).³⁰ The ADRA

²⁷ Most federal agencies have a Board of Contract Appeals. BCAs were created to avoid cases in which a department head or agency made a final determination of law. *See* Gene Ming Lee, Note, *A Case for Fairness in Public Works Contracting*, 65 *FORDHAM L. REV.* 1075, 1112 (1996).

²⁸ *See* Crowell & Pou, *supra* note 5, at 190. A contractor that is dissatisfied with an officer's decision may bring a dispute before the BCA or Court of Federal Claims if it is greater than \$50,000. *See* Lee, *supra* note 27, at 112. ADR is sometimes used in the Court of Federal Claims and BCAs. *See* AMERICAN ARBITRATION ASS'N, *supra* note 23, at 202. ADR techniques used by various Boards of Contract Appeals and the Court of Federal Claims will not be discussed in this Note.

²⁹ 5 U.S.C. §§ 571–583 (1994) (amended 1996). For a thorough analysis of the degree of confidentiality under the ADRA, *see* generally Mark H. Grunewald, *Freedom of Information and Confidentiality Under the Administrative Dispute Resolution Act*, 9 *ADMIN. L.J. AM. U.* 985 (1996).

³⁰ *See* AMERICAN ARBITRATION ASS'N, *supra* note 23, at 196. The ADRA originally was enacted following Congress's determination of the following:

(1) administrative procedure, as embodied in . . . [the] United States Code . . . is intended to offer a prompt, expert, and inexpensive means of resolving disputes as an alternative to litigation in the Federal courts;

(2) administrative proceedings have become increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time and decreased likelihood of achieving consensual resolution of disputes;

(3) alternative means of dispute resolution have been used in the private sector for many years and, in appropriate circumstances, have yielded decisions that are faster, less expensive, and less contentious;

(4) such alternative means can lead to more creative, efficient, and sensible outcomes;

(5) such alternative means may be used advantageously in a wide variety of administrative programs;

(6) explicit authorization of the use of well-tested dispute resolution techniques will eliminate ambiguity of agency authority under existing law;

(7) Federal agencies may not only receive the benefit of techniques that were developed in the private sector, but may also take the lead in further development and refinement of such techniques; and

"buoyed the hopes"³¹ of many individuals who sought to use ADR to resolve disputes between the government and private parties.³² The ADRA authorized parties in federal agencies to agree to use ADR techniques. The ADRA required federal agencies to implement ADR policies and also required agencies to designate a dispute resolution specialist.³³ While the ADRA has sought to increase the use of ADR, there has been an inconsistency of ADR implementation by federal agencies.³⁴ Some agencies have implemented expansive ADR programs aggressively.³⁵ Other agencies have only "token ADR policies that do not aggressively promote the use of ADR through training or pilot programs."³⁶ Failure of the ADRA to promote significant federal agency ADR prompted Congress to enact additional ADR legislation.

The Administrative Dispute Resolution Act of 1996 (ADRA of 1996)³⁷ amended the ADRA to make the ADRA permanent and to remedy flaws³⁸ in the ADRA.³⁹ The ADRA already specifically addressed dispute resolution application in the government contract setting.⁴⁰ The ADRA required "[e]ach agency to review each of its standard agreements for *contracts*,

(8) the availability of a wide range of dispute resolution procedures, and an increased understanding of the most effective of such procedures, will enhance the operation of the Government and better serve the public.

Administrative Dispute Resolution Act § 2, 5 U.S.C. § 571 note (1994) (Congressional Findings). The above findings indicate Congress's overwhelming acceptance of the benefits of ADR.

³¹ Carr et al., *supra* note 17, at 33.

³² *See id.*

³³ *See* AMERICAN ARBITRATION ASS'N, *supra* note 23, at 33.

³⁴ *See* Carr et al., *supra* note 17, at 33.

³⁵ The United States Army Corps of Engineers has promoted ADR methods aggressively to resolve construction disputes. *See id.* at 34.

³⁶ *Id.*

³⁷ 5 U.S.C. §§ 571–584 (1994 & Supp. IV 1998).

³⁸ *See* Colonel McCann, *Recent Changes to the Administrative Dispute Resolution Act Affecting Federal Agency Use of Alternative Dispute Resolution Technique*, ARMY LAW., July 1997, at 34, 35. One flaw of the ADRA was its failure to increase the use of ADR in the federal government—a Federal Bar Association Construction Committee survey indicated that private contractors had little knowledge about the ADRA, the existence of agency ADR specialists, or methods for utilizing ADR in government contract disputes. *See* Carr et al., *supra* note 17, at 37.

³⁹ *See* McCann, *supra* note 38, at 35.

⁴⁰ *See* Alternative Dispute Resolution Act § 3(d)(1), 5 U.S.C. § 571 note (1994) (Promotion of Alternative Means of Dispute Resolution) (amended 1996).

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grants, and other assistance.”⁴¹ It also required each agency to “determine whether to amend any such agreements to authorize and encourage the use of alternative means of dispute resolution.”⁴² The enactment of the ADRA of 1996 then reaffirmed Congress’s recognition of the value and benefits of ADR methods by making those provisions permanent. In addition, the ADRA of 1996 likely will promote increased use of ADR in the federal government.⁴³

III. RESOLVING GOVERNMENT CONSTRUCTION CONTRACT DISPUTES WITH PARTNERING AND DISPUTE REVIEW BOARDS

Government construction projects begin with a design phase that involves planning and preparation.⁴⁴ Next, the contractors bid and the government awards the project.⁴⁵ Finally the actual construction begins.⁴⁶ Problems occur at multiple points in the construction phase.⁴⁷ The opportunity for multiple problems during the course of a construction project is the main reason the U.S. construction industry is one of the country’s most inefficient industries.⁴⁸ Subpart A of this Part briefly explains the reasons the federal government, specifically the U.S. Army Corps of Engineers, uses dispute prevention and dispute resolution techniques when resolving government construction contract disputes. Subpart B defines partnering and dispute review boards. Subpart C explains why partnering should be used in conjunction with DRBs.

⁴¹ *Id.* (emphasis added).

⁴² *Id.*

⁴³ See McCann, *supra* note 38, at 35; see also Alternative Dispute Resolution Act of 1996 § 9, 5 U.S.C. § 571 note (Supp. IV 1998) (Termination Date; Savings Provision).

⁴⁴ See Lee, *supra* note 27, at 1076.

⁴⁵ See *id.*

⁴⁶ See *id.* Although this three-step process of a construction project looks simple, a construction project has inherent complexity. See HOUSE ET AL., *supra* note 21, at 48.

⁴⁷ Problems usually arise during a construction project as a result of the following: (1) contract provisions that shift the risk to the unprepared party, (2) unrealistic expectations of the parties, (3) ambiguous contract documents, (4) underbidding, (5) poor communication between those working on the project, (6) inadequate contractor management, (7) failure to deal with changes expediently, (8) lack of team spirit, (9) adversarial attitudes, and (10) contract administrators who fail to remedy problems. See *Preventing and Resolving Construction Disputes*, 9 ALTERNATIVES TO HIGH COSTS LITIG. 182, 185 (1991) (setting forth findings based on surveys by the Construction Industry Institute and the Center for Public Resources Construction Disputes Committee). For a list of additional typical construction problems, see Lee, *supra* note 27, at 1084–90.

⁴⁸ See CPR INST. FOR DISPUTE RESOLUTION, *supra* note 7, at I-15.

A. *Reasons Federal Agencies Considered Dispute Prevention and Dispute Resolution Techniques to Resolve Government Construction Contract Disputes*

Rising government discovery costs⁴⁹ were one reason the U.S. Army Corps of Engineers⁵⁰ ("the Corps") considered dispute prevention and dispute resolution methods.⁵¹ Discovery costs are high in construction litigation for three primary reasons. First, voluminous documentation raises discovery costs. The typical construction dispute is based on a breach of contract, and these breaches occur over extended time periods involving voluminous documentation.⁵² Second, the lengthy duration of a construction project increases discovery costs.⁵³ A large construction project is likely to take a year or more to build;⁵⁴ therefore, allowing claims to pile up during a construction project makes the claims difficult to document and difficult to evaluate, and in some cases the claims may become stale.⁵⁵ Last, the high discovery cost of expert witness fees prompted the Corps to pursue alternative means of resolving construction contract claims.⁵⁶ During litigation a party must call technical experts such as engineers or architects.⁵⁷ Experts that are capable of persuading a trier of fact⁵⁸ usually

⁴⁹ The U.S. Army Corps of Engineers is a government-contracting agency involved in many construction contracts. *See In Partnering, a Creative New ADR Concept, Talk and Team Spirit Are the Fundamentals*, 9 ALTERNATIVES TO HIGH COSTS LITIG. 38, 38 (1991).

⁵⁰ In a survey that asked participants to rank reasons to use ADR from one to ten, "[w]hether ADR will save costs" ranked number one. *See Carr et al., supra* note 17, at 35; cf. Hazel Glenn Beh, *Allocating the Risk of Unforeseen, Subsurface and Latent Conditions in Construction Contracts: Is There Room for the Common Law?*, 46 U. KAN. L. REV. 115, 115 n.5 (1997) (citing various articles that discuss construction projects that went millions of dollars over budget).

⁵¹ *See* Lester Edelman, *Partnering: Paving the Way to Dispute Avoidance*, PUNCH LIST, June 1993, at 1, 1.

⁵² *See* HOUSE ET AL., *supra* note 21, at 57.

⁵³ *See* H. WARREN KNIGHT ET AL., CALIFORNIA PRACTICE GUIDE: ALTERNATIVE DISPUTE RESOLUTION ch. 3B (1997).

⁵⁴ *See* CPR INST. FOR DISPUTE RESOLUTION, *supra* note 7, at I-16.

⁵⁵ *See* KNIGHT ET AL., *supra* note 53, at ch. 3B. By the time a construction trial takes place, counsel will have had nearly to reconstruct the entire project and project history; this includes thousands of pages of documentary exhibits. *See* CPR INST. FOR DISPUTE RESOLUTION, *supra* note 7, at I-16.

⁵⁶ *See* Edelman, *supra* note 51, at 1.

cost \$800 to \$2000 or more per day.⁵⁹ Each of the above factors makes litigation discovery costs substantial.

Second, the Corps implemented dispute prevention and resolution procedures⁶⁰ because of the “ripple effect of litigation on management operations.”⁶¹ Any resort to the courts in a construction dispute involves many parties.⁶² Ultimately, an industry has been created to provide litigation consultants and experts to support litigation efforts. This industry merely adds costs to both sides.⁶³

Third, the Corps also indicated that economic hardship on contractors was a significant reason it investigated using dispute prevention and resolution.⁶⁴ Despite the possibility of business collapse, “*high risk* is the salt of the construction business, . . . [and] *controversy*”^[65] is the pepper.”⁶⁶ This high risk means construction parties must “consider the possibility of ultimate failure of recovery.”⁶⁷ In many cases, a contracting business may fail even before the construction dispute is litigated fully.⁶⁸ A fifty-year

⁵⁷ See JAY E. GREINIG, *ALTERNATIVE DISPUTE RESOLUTION WITH FORMS* § 11.1 (2d ed. 1997). Experts testify “about everything from design issues to jobsite customs and practices. [For example,] [t]he beam might keep the floor from collapsing, but was sufficient account taken of deflection to make the floor useful?” *AMERICAN ARBITRATION ASS’N*, *supra* note 23, at 11.

⁵⁸ The use of technical experts to persuade the trier of fact is expensive, but it also creates jury confusion. The lay juror typically does not have knowledge of construction, engineering, or contracting. See *AMERICAN ARBITRATION ASS’N*, *supra* note 23, at 11.

⁵⁹ See *HOUSE ET AL.*, *supra* note 21, at 58.

⁶⁰ See Edelman, *supra* note 51, at 1.

⁶¹ Grassley & Pou, *supra* note 6, at 17 (quoting Lester Edelman, *Applying ADR to Contract Claims*, 1 *ADMIN. L.J.* 553, 555 (1987)).

⁶² The following is a list of typical parties involved in a construction project: (1) the owner (the government), (2) the construction financier, (3) the design professionals, (4) the prime contractor, (5) the subcontractor, (6) the supplier, (7) the surety, (8) the construction manager, (9) the labor union, (10) the consultant, (11) the adjacent landowner, (12) the local government body, (13) the federal government agency, and (14) the public. See *HOUSE ET AL.*, *supra* note 21, at 3–5.

⁶³ See Grassley & Pou, *supra* note 6, at 17.

⁶⁴ See Edelman, *supra* note 51, at 1.

⁶⁵ Controversies arise for many of the reasons stated above, such as the technical nature of construction disputes, the protracted performance period, the involvement of many parties, and the voluminous documentation and diverse range of activities. See *HOUSE ET AL.*, *supra* note 21, at 1.

⁶⁶ *Id.*

⁶⁷ *Id.* at 75.

⁶⁸ See *id.* Of course, the government “contracting business” will not fail, but the private contractors involved in a government contract might.

statistical survey revealed that thirty-nine percent of all contractors contract for only two and one-half years. Sixty-one percent of contractors stopped contracting within only five and one-half years.⁶⁹

Finally, the Corps considered using dispute prevention and dispute resolution to resolve contract disputes because the delays in getting construction officer decisions were becoming unreasonable.⁷⁰ The time beginning from receiving a contracting officer's⁷¹ decision through filing a contract appeal and through receiving a final decision was anywhere from two to four years.⁷² Certain disputes can delay a project for months, or even years, if they are not resolved.⁷³ A construction project may never get completed if parties must wait two to four years to resolve disputes.⁷⁴

B. Partnering and Dispute Review Boards: What Are They?

The Corps has adopted policies to further the use of an array of dispute prevention and ADR methods.⁷⁵ The highest ranking officer of the Corps expressed the strong commitment of the Corps to ADR: "The U.S. Army Corps of Engineers seeks to accomplish its missions in the most effective and efficient manner possible The Corps of Engineers is the leader in the Federal Government in using ADR."⁷⁶

⁶⁹ See *id.* at 1.

⁷⁰ See Edelman, *supra* note 51, at 1.

⁷¹ For a discussion of the contracting officer's role in resolving disputes, see *supra* Part II.A.

⁷² See Edelman, *supra* note 51, at 1.

⁷³ See Darrick M. Mix, Note, *ADR in the Construction Industry: Continuing the Development of a More Efficient Dispute Resolution Mechanism*, 12 OHIO ST. J. ON DISP. RESOL. 463, 464 (1997).

⁷⁴ See KNIGHT ET AL., *supra* note 53, at ch. 3B.

⁷⁵ See Grassley & Pou, *supra* note 6, at 17. The Corps received an award from the Center for Public Resources for its cutting edge leadership as the first federal agency to institute an ADR program. See AMERICAN ARBITRATION ASS'N, *supra* note 23, at 202.

⁷⁶ In *Partnering, A Creative New ADR Concept, Talk and Team Spirit Are the Fundamentals*, *supra* note 49, at 39. The Corps' ADR leadership is also evidenced by the fact that it has adopted policies to further the use of minitrial, mediation, and summary proceedings (in addition to partnering and DRBs). For a discussion of the use of the minitrial to resolve government contract disputes, see generally Reba Page & Frederick J. Lees, *Roles of Participants in the Mini-trial*, 18 PUB. CONT. L.J. 54 (1988). The Corps has been successful in resolving some massive disputes through mediation. See Groton, *supra* note 9, at 49, 50.

The Corps' leadership in government ADR is one reason it pioneered the use of partnering⁷⁷ and dispute review boards.⁷⁸ Although the Corps pioneered the DRB method, the Corps and other members in the private and public construction industry rely on partnering to resolve disputes. However, partnering is not actually a dispute resolution method. This subpart explains that although the construction industry touts partnering as a "cure all" for construction disputes, partnering necessarily fails to resolve disputes. Therefore a dispute resolution method must be available.⁷⁹ DRBs are an appropriate dispute resolution method for the federal government to use for a variety of reasons; these reasons will be discussed below. But before eliciting reasons to use DRBs with partnering, one must be familiar with partnering and DRBs.

1. *Preventing Disputes with Partnering: What Is Partnering?*

The dispute *prevention* method, partnering, was created as a response to the widespread adversarial relationship between the government and the contractor.⁸⁰ Typically, "[c]onstruction contracting exists in a largely adversarial atmosphere where collective needs and interests are either subordinated to individual needs, or ignored entirely. The result? Closed lines of communication, mistrust and escalating disputes."⁸¹ A senior counsel for the Corps emphasized the adversarial nature of the contracting parties' relationship by saying, "[i]n the old days, they would have had their meetings and we would have had our meetings,"⁸² and never would the parties have met early on to discuss the contract relationship. Thus, we have partnering. As mentioned earlier, partnering is not a dispute resolution procedure per se. Rather, it is a dispute prevention process.⁸³ Partnering is

⁷⁷ See Page & Lees, *supra* note 76, at 52.

⁷⁸ See Crowell & Pou, *supra* note 5, at 234–36.

⁷⁹ See Allen L. Overcash, *The Truth About Partnering Limitations and Solutions* (visited Jan. 14, 2000) <<http://www.adr.org/pl/plv21n02-1.html>>.

⁸⁰ See *id.*

⁸¹ Mark E. Appel, *Partnering: New Dimensions in Dispute Prevention and Resolution*, ARB. J., June 1993, at 47, 47.

⁸² In *Partnering, a Creative New ADR Concept, Talk and Team Spirit Are the Fundamentals*, *supra* note 49, at 46.

⁸³ See Appel, *supra* note 81, at 47. "[T]he primary focus of partnering is *dispute prevention*, as opposed to dispute resolution." *Id.* Thomas J. Stipanowich has pointed out that "[b]y definition, partnering is not a dispute resolution process at all." Stipanowich, *Beyond Arbitration*, *supra* note 19, at 144.

also known as “creative cooperation”⁸⁴ and “collaborative contracting”⁸⁵ in the construction industry. Partnering is a method of conducting construction contracts in which the parties focus on building a “team”⁸⁶ to prevent disputes from arising.⁸⁷ The Corps defines partnering as “the creation of a relationship between owner and contractor that promotes achievement of mutual and beneficial goals.”⁸⁸ Ultimately, partnering focuses on preventing construction disputes by nurturing the relationship between the contracting parties.

Regardless of how one defines partnering, an effective partnering relationship must have the following critical ingredients.⁸⁹ The first essential ingredient is *commitment*.⁹⁰ This commitment to cooperate must begin prior to the project start.⁹¹ Second, every member of the project team must *trust* one another as partners, and not as adversaries.⁹² Third, *communication* is necessary to maintain and strengthen the cooperative relationship. Fourth, the contractor and government representatives must identify their goals and objectives in order to implement a plan with mutual goals and objectives.⁹³ Finally, the project members must implement an evaluation process.⁹⁴ The evaluation reports should consider both problems and progress. The above

⁸⁴ See CPR INST. FOR DISPUTE RESOLUTION, *supra* note 7, at I-57.

⁸⁵ See Appel, *supra* note 81, at 47. “In other words, partnering is a synergy—a cooperative, collaborative management effort among contracting parties to complete a project in the most efficient, cost-effective way possible.” Mix, *supra* note 73, at 474 (quoting Carolyn M. Penna, *Partnering: Avoiding Disputes in the Construction Industry*, N.Y.L.J., Sept. 2, 1993, at 3, 3).

⁸⁶ Focusing on improving “team” spirit is considered very important in the construction contracting process, in which traditionally the contracting parties take on adversarial roles. See Appel, *supra* note 81, at 47.

⁸⁷ See *Preventing and Resolving Construction Disputes*, *supra* note 47, at 183.

⁸⁸ CPR INST. FOR DISPUTE RESOLUTION, *supra* note 7, at I-58. Both the Corps and the Construction Industry Institute have partnering definitions. The Construction Industry Institute defines partnering as “a long-term commitment between two or more organizations for the purpose of achieving their specific business objectives by maximizing the effectiveness of each participant’s resources.” AMERICAN ARBITRATION ASS’N, CONSTRUCTION INDUSTRY DISPUTE AVOIDANCE: THE PARTNERING PROCESS 1 (1993).

⁸⁹ See AMERICAN ARBITRATION ASS’N, *supra* note 88, at 1.

⁹⁰ See *id.* at 2.

⁹¹ See *id.*

⁹² See *id.*

⁹³ See Edelman, *supra* note 51, at 4.

⁹⁴ See AMERICAN ARBITRATION ASS’N, *supra* note 88, at 2.

five ingredients are essential components of a successful partnering relationship.⁹⁵

The contracting parties must decide to use partnering before creation of the contract.⁹⁶ After the contracting parties agree to use partnering, the Corps requires the low bidder of any competitively bid contract to send the project officers to a weekend retreat⁹⁷ with a neutral facilitator⁹⁸ and Corps representatives.⁹⁹ At the retreat, the project representatives discuss and explore possible conflicts and conflict resolution.¹⁰⁰ The most important aspect of the partnering retreat is the design of dispute resolution systems.¹⁰¹ Here the parties can discuss the use of DRBs or other dispute resolution mechanisms. At the end of the initial retreat, a “partnership agreement” is signed in addition to the original construction contract. This agreement highlights the goals discussed by the retreat attendees.¹⁰² It is important for the contracting parties to remember that the partnering retreat is only the beginning of the partnering endeavor.¹⁰³ For partnering to prevent disputes effectively, the contracting parties must continue to work together as a team through project completion.¹⁰⁴ The parties may continue to work together

⁹⁵ *See id.*

⁹⁶ *See Appel, supra* note 81, at 48.

⁹⁷ The number of attendees on a retreat varies depending on the size of the project. In one \$35 million Corps project, 16 people went on the retreat, and in a \$140 million project, 38 people attended the retreat. *See In Partnering, a Creative New ADR Concept, Talk and Team Spirit Are the Fundamentals, supra* note 49, at 39.

⁹⁸ The Corps employs a neutral facilitator to avoid adversarial or suspicious attitudes. The facilitator is from a company unaffiliated with the Corps, and the Corps pays for the cost of the facilitator. *See id.* at 40. For a discussion of how to select a partnering facilitator, see *Building Success for the 21st Century* (visited Jan. 15, 2000) <http://www.adr.org/rules/guides/partnering_guide.html>.

⁹⁹ *See Geller, supra* note 2, at 14. The retreat should never be held at the offices of either party; they must be held at a neutral location. *See In Partnering, a Creative New ADR Concept, Talk and Team Spirit Are the Fundamentals, supra* note 49, at 39.

¹⁰⁰ *See Geller, supra* note 2, at 14.

¹⁰¹ *See In Partnering, a Creative New ADR Concept, Talk and Team Spirit Are the Fundamentals, supra* note 49, at 40. Although this is an important aspect of the retreat, the resolution procedure is usually not put into the “partnership agreement.” *See id.* at 46.

¹⁰² *See id.*

¹⁰³ *See AMERICAN ARBITRATION ASS’N, supra* note 88, at 3.

¹⁰⁴ *See Geller, supra* note 2, at 14. The “team” relationship is best embodied in a statement made by Lester Edelman, Chief Counsel of the U.S. Army Corps of Engineers: “[I]nstead of having two armed camps out there, we have two groups trying to understand each other. Ideally, that mutual effort born on the first weekend will continue throughout the course of the project.” *Id.*

with follow-up workshops, re-examination of project goals, and additional action plans.¹⁰⁵

2. *Early Resolution of Disputes with a Dispute Review Board: What Is a Dispute Review Board?*

A DRB is the best way to resolve government construction disputes as they arise¹⁰⁶ if the parties are unable to resolve the dispute informally. The Corps¹⁰⁷ developed the DRB procedures to resolve factual disputes at the contracting officer level, before the contractor files an appeal of a contracting officer's decision.¹⁰⁸ As mentioned earlier,¹⁰⁹ the first stage for formal resolution of a construction dispute claim is governed by the Contract Disputes Act. Under the CDA the contracting officer attempts to remedy the dispute. If the contractor is unhappy with the officer's decision, the contractor may request a final opinion from the contracting officer. The contractor then may appeal this final opinion to the Board of Contract Appeals or the United States Court of Federal Claims. Alternatively, the dissatisfied contractor may submit the dispute to a DRB.¹¹⁰ Although the Corps created DRBs to be used at this contracting officer level, the DRB also can be used informally, even before the contracting officer issues a final opinion and before the decision is ready to be appealed. Typically, the DRB is used only after informal settlement has failed but before the parties have gone to the contracting officer.¹¹¹

The DRB group is organized before¹¹² the construction project begins.¹¹³ The DRB is a group of three experienced, respected, and neutral

¹⁰⁵ See Robert A. Shearer et al., *Partnering: A Commitment to Common Goals*, DISP. RESOL. J., Apr.–June 1995, at 31, 31.

¹⁰⁶ See Rubin & Carbajal-Quintas, *supra* note 7, at 444. The DRB technique was first used on the Eisenhower Tunnel, a major tunneling project from 1975 to 1979, but DRBs are still relatively new to the construction industry. See John R. Kohnke, *Dispute Review Boards: Rising Star of Construction ADR*, ARB. J., June 1993, at 52, 52.

¹⁰⁷ The U.S. Army Corps of Engineers, South Atlantic Division, developed the DRB procedure to resolve factual construction disputes. See Crowell & Pou, *supra* note 5, at 234.

¹⁰⁸ See *id.*

¹⁰⁹ See *supra* Part II.A.

¹¹⁰ See Crowell & Pou, *supra* note 5, at 234.

¹¹¹ See AMERICAN ARBITRATION ASS'N, CONSTRUCTION INDUSTRY DISPUTE REVIEW BOARD PROCEDURES 6 (1993).

¹¹² Organizing the DRB group before construction begins includes incorporating a "DRB disputes" clause into the construction contract. See *infra* Part IV.C.

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individuals.¹¹⁴ The DRB members¹¹⁵ visit the construction jobsite intermittently and are kept advised of project progress.¹¹⁶ When a claim is submitted to the DRB, it conducts an informal hearing at the jobsite.¹¹⁷ During the DRB hearing, each party presents its position and answers questions from the other party.¹¹⁸ When the hearing is concluded, the DRB privately deliberates and issues a nonbinding¹¹⁹ written recommendation as soon as possible.¹²⁰ If the DRB's recommendation is accepted¹²¹ by the

¹¹³ See ROBERT M. MATYAS ET AL., CONSTRUCTION DISPUTE REVIEW BOARD MANUAL 3, 4 (1996). Formation of a DRB includes an eleven step process, which has been summarized as follows:

- (1) Owner evaluates applicability of DRB;
- (2) Owner decides to use DRB;
- (3) Owner coordinates DRB provisions with standard contract language and includes DRB specification and three-party agreement in bidding documents;
- (4) After contract award, each party nominates one DRB member;
- (5) Contractor and owner each approve other's nominee;
- (6) Owner provides first two members with contract documents;
- (7) First two DRB members confer and select third member;
- (8) Both parties approve third member;
- (9) Owner provides third member with contract documents;
- (10) Three-party agreement signed;
- (11) Organization meeting held at site;

Id. at 5. In the government contract setting, "owner" parallels "government." Thus, the formation of a DRB in a government contract setting requires the government and the contractor to agree, at the time the contract is signed, to create a DRB. One member of the DRB is chosen by the government, another by the contractor, and the third member is chosen by the government and the contractor. See Kohnke, *supra* note 106, at 53. DRB fees are shared—the government pays for its representative, the contractors for theirs, and the government and contractors split the fees for the third member. See *id.*

¹¹⁴ See MATYAS ET AL., *supra* note 113, at 3. A DRB is a group of trusted experts who will "monitor the progress of the project and be available to render advisory decisions on short notice concerning any disputes the parties are not able to resolve themselves." Groton, *supra* note 9, at 53.

¹¹⁵ Proper member selection is a critical element in the DRB process. Members must be objective and serve both parties impartially and equally. The government and the contractor need to be confident that the members are impartial. See AMERICAN ARBITRATION ASS'N, *supra* note 111, at 1.

¹¹⁶ See *id.*

¹¹⁷ See Rubin & Carbajal-Quintas, *supra* note 7, at 446.

¹¹⁸ See MATYAS ET AL., *supra* note 113, at 4.

¹¹⁹ See Groton, *supra* note 9, at 53.

¹²⁰ See Rubin & Carbajal-Quintas, *supra* note 7, at 446. There are usually at least four features of a DRB recommendation, as follows: (1) a short statement of the dispute;

parties, then the government will expeditiously make the required contract modifications.¹²² If the DRB's recommendations are not accepted, then the parties must resort to another dispute resolution mechanism.¹²³

C. Reasons to Use Partnering with a Dispute Review Board

Although there are many advantages to partnering, it is critical to use it in conjunction with a dispute resolution method. There are numerous reasons to use partnering with a DRB. Overall, partnering and DRBs on their own successfully save costs and time. However, despite the general success of partnering, there are weaknesses of partnering that do not ensure dispute prevention. DRBs successfully complement the weaknesses of partnering.

1. General Advantages of Partnering and Dispute Review Boards

Partnering has been highly effective in saving costs for all stakeholders in a construction project in many ways. First, open communication and creation of issue resolution strategies such as DRBs reduce¹²⁴ litigation exposure.¹²⁵ Open communication and cooperation also reduce the risk that the project will run over budget.¹²⁶ A report by the Dispute Avoidance and Resolution Task Force of the American Arbitration Association revealed that use of partnering in several projects involving a total of \$492 million

(2) a reiteration of each party's arguments, (3) the recommendation itself, and (4) the reasons for the board's recommendation. *See* MATYAS ET AL., *supra* note 113, at 21.

¹²¹ "Acceptance by the parties is facilitated by their confidence in the DRB—in its members' technical expertise, firsthand understanding of the project conditions, and practical judgment—as well as by the parties' opportunity to be heard." MATYAS ET AL., *supra* note 113, at 4.

¹²² *See* Crowell & Pou, *supra* note 5, at 235.

¹²³ Typically both parties accept DRB decisions, and the parties may agree in their contract that the DRB's decision will be admissible into evidence if there is subsequent arbitration or litigation. *See* Groton, *supra* note 9, at 53.

¹²⁴ A survey of members of Associated General Contractors indicated that they consider partnering a highly effective tool in minimizing future disputes. *See* Stipanowich, *Beyond Arbitration*, *supra* note 19, at 150.

¹²⁵ *See* AMERICAN ARBITRATION ASS'N, *supra* note 88, at 3.

¹²⁶ *See id.*

averaged seven percent in savings.¹²⁷ Partnering was the favored cost-minimizing technique among construction industry contractors.¹²⁸

DRBs are also effective at saving costs.¹²⁹ These cost savings are a result of the early resolution of disputes.¹³⁰ Disputes are resolved early for two reasons. First, parties remedy disputes with specific DRB recommendations. Also, the presence of the DRB creates an incentive for settlement, which reduces other dispute resolution costs.¹³¹ Deferring a dispute for later resolution only increases the expense for attorney fees, documents, or expert witnesses.¹³²

Partnering and DRBs are highly effective at completing the project on time. A survey by the Construction Industry Institute showed that out of thirty partnered construction projects totaling \$684 million, eighty-three percent were completed on time or early.¹³³ Using DRBs to resolve disputes as they occur also increases the likelihood of timely project completion. Resolving disputes as they arise reduces their impact on the project as a whole.¹³⁴ DRBs effectively resolve issues that are critical to timely project completion, such as design issues, supply issues, delay issues, and follow-up work issues. Resolving these issues as they arise allows the project to

¹²⁷ See *Building Success for the 21st Century* (visited Jan. 15, 2000), <http://www.adr.org/rules/guides/partnering_guide.html>.

¹²⁸ See Stipanowich, *Beyond Arbitration*, *supra* note 19, at 149. The contractors compared partnering to binding arbitration, DRBs, early neutral evaluation, mediation, and nonbinding arbitration. *See id.*

¹²⁹ See Michael R. DeSilva, *Moving ADR to the Construction Jobsite* (visited Jan. 14, 2000) <<http://www.adr.org/pl/plv19n01-1.html>>. The cost of DRB proceedings ranges between .04% to .51% of project cost. This amount is significantly less than the cost of arbitrating or litigating disputes. *See Mix, supra* note 73, at 476.

¹³⁰ See Kohnke, *supra* note 106, at 55. Timely resolution of disputes gives the contracting parties a better idea of the project's actual cost. *See id.*

¹³¹ "At the very least, it [the DRB] should encourage realistic and effective negotiation, and discourage bad-faith negotiating between parties." Geller, *supra* note 2, at 15. In a Seattle, Washington transit project, the project spanned from 1986 to 1988 and cost \$50 million. Three major claims were negotiated without a DRB hearing, but the DRB existence promoted cost-negotiated settlement; the cost of the DRB was \$20,000, which is minimal compared to the \$50 million project and potential litigation expenses. *See id.*

¹³² See Michael R. DeSilva, *Moving ADR to the Construction Jobsite* (visited Jan. 14, 2000) <<http://www.adr.org/pl/plv19n01-1.html>>.

¹³³ See *Building Success for the 21st Century* (visited Jan. 15, 2000) <http://www.adr.org/rules/guides/partnering_guide.html>.

¹³⁴ See Michael R. DeSilva, *Moving ADR to the Construction Jobsite* (visited Jan. 14, 2000) <<http://www.adr.org/pl/plv19n01-1.html>>.

continue uninterrupted.¹³⁵ DRBs also promote timely project completion because presence of DRBs stimulates settlement, even when partnering does not.¹³⁶

2. Disadvantages of Partnering

First, the idea of partnering sounds great, but attitudes of the parties sometimes destroy the partnering relationship.¹³⁷ Partnering is really an attitude and a mindset in which the ultimate goal is the elimination of “us” versus “them.”¹³⁸ This abstract attitude is difficult to maintain.¹³⁹ It is even more difficult to maintain an “us” attitude when parties are self-interested. These selfish interests are perpetuated in government construction contracts as a result of government bureaucracy. Politics and bureaucratic pressure may control an official’s attitude and actions.¹⁴⁰ If an “us” attitude is not maintained, communication may not be productive or even friendly.¹⁴¹ In sum, if the attitudes between the parties fail to foster a cooperative environment, then partnering will not prevent disputes.

Second, partnering may not prevent disputes because of flaws in the partnering process.¹⁴² Failure to create the partnering relationship before the project begins will minimize the dispute prevention potential of the partnered relationship.¹⁴³ If the senior management on the project is not involved in the partnering process, then partnering will be ineffective.¹⁴⁴

¹³⁵ See *id.*

¹³⁶ See Stipanowich, *Beyond Arbitration*, *supra* note 19, at 126.

¹³⁷ See Allen L. Overcash, *The Truth About Partnering Limitations and Solutions* (visited Jan. 14, 2000) <<http://www.adr.org/pl/plv21n02-1.html>>.

¹³⁸ See Edelman, *supra* note 51, at 4.

¹³⁹ It is not uncommon for partnering veterans to say that the partnering sessions “did not change the attitude of the parties.” Allen L. Overcash, *The Truth About Partnering Limitations and Solutions* (visited Jan. 14, 2000) <<http://www.adr.org/pl/plv21n02-1.html>>.

¹⁴⁰ See Carr et al., *supra* note 17, at 36.

¹⁴¹ See Allen L. Overcash, *The Truth About Partnering Limitations and Solutions* (visited Jan. 14, 2000) <<http://www.adr.org/pl/plv21n02-1.html>>.

¹⁴² Some of the failure of a partnered relationship can be avoided if the parties comply with the partnering guidelines established in *Building Success for the 21st Century* (visited Jan 15, 2000) <http://www.adr.org/rules/guides/partnering_guide.html>.

¹⁴³ See *id.* (explaining that early start of the partnered relationship results in cost savings).

¹⁴⁴ See *id.* The Corps has indicated that to successfully implement partnering, one needs a “‘champion’ at a high management level.” Edelman, *supra* note 51, at 4.

Failure to involve senior management in the partnering process will provide little incentive for lower management and employees on the project to cooperate.¹⁴⁵ When government contracts are involved, “politics may be so bad on the project that senior management is afraid to override lower management project representatives.”¹⁴⁶ In addition, even if senior management has adopted partnering, personnel may not embrace it because it requires more work for them.¹⁴⁷ Finally, the partnering process requires continual cooperation. Failure to exchange information continually and focus on team spirit will render the partnering relationship ineffective at preventing disputes.¹⁴⁸

The ultimate weakness of partnering is its failure to offer the services of an intermediary or decisionmaker when disputes are not prevented.¹⁴⁹ Because “the seeds of a dispute may need more than communication and cooperation to prevent its growth[,] [t]he goodwill of those attending a partnering session is often not enough to settle problems that may have resulted from decisions or other factors beyond their immediate control.”¹⁵⁰ Once the partnering process has failed to prevent disputes, it is difficult for personnel to resolve disputes on their own.¹⁵¹ Leaving unavowed disputes to litigation or arbitration is not the answer. Employing DRBs is the answer.

3. Advantages of Using DRBs with Partnering

As mentioned earlier, partnering does not completely prevent disputes. Even the most enthusiastic partnering advocates believe partnering cannot avoid disputes entirely; therefore, DRBs should be an available safety net for the parties.¹⁵² There are other ADR methods that one could use instead of partnering, such as mediation or summary jury trial, but partnering and DRBs strongly complement each other in a variety of areas.

¹⁴⁵ See Edelman, *supra* note 51, at 4.

¹⁴⁶ Carr et al., *supra* note 17, at 36.

¹⁴⁷ See *id.* Partnering is difficult to implement successfully without “hard work” from all involved. Edelman, *supra* note 51, at 4.

¹⁴⁸ See Shearer et al., *supra* note 105, at 31. Failure of the partnering relationship can be avoided through follow-up workshops, re-examination of project goals, and additional action plans. See *id.*

¹⁴⁹ See Allen L. Overcash, *The Truth About Partnering Limitations and Solutions* (visited Jan. 14, 2000) <<http://www.adr.org/pl/plv21n02-1.html>>.

¹⁵⁰ *Id.*

¹⁵¹ See *id.*

¹⁵² See MATYAS ET AL., *supra* note 113, at 11.

Partnering and DRBs complement one another because each lends itself to complex construction projects. The more complex, lengthy, and larger the project, the greater the potential for partnering.¹⁵³ Likewise, DRBs have become popular to resolve large complex construction claims, such as tunnels, highways, and bridges.¹⁵⁴ DRBs have enjoyed an almost 100% success rate on underground and tunneling projects, both considered extremely difficult construction jobs.¹⁵⁵ Because both of these methods are suited to large construction disputes, they will complement each other when used in conjunction on a project.

DRBs complement partnering because the DRB will not terminate until the project is complete, whereas partnering terminates when the relationship dwindles.¹⁵⁶ There is no dwindling away of the DRB. Once the partnering relationship has deteriorated, the likelihood for disputes increases. Without a dispute resolution procedure available the project may never be completed. The DRB will not terminate until the project is complete and all disputes are resolved.¹⁵⁷

Parties involved in construction disputes tend to favor dispute resolution mechanisms like DRBs because they involve neutral parties. A DRB may be more effective at resolving disputes than partnering because the DRB members are entirely neutral.¹⁵⁸ In contrast, construction parties in a partnered relationship cannot remain entirely neutral. For instance, in many cases government managers feel they must distance themselves from a contract to avoid the appearance of any impropriety.¹⁵⁹ In addition, if a dispute is sent to the contracting officer, it "creates a dual, potentially conflicting role for the contracting officer. . . . [T]he contracting officer is not only to represent the government as a party to the contract, but also . . . is to make . . . decisions on claims."¹⁶⁰ The neutrality of the DRB counterbalances partnering biases of those involved in the partnered relationship such as managers or contracting officers. Parties are likely to accept DRB recommendations versus a recommendation from nonneutral parties in the partnering relationship because the DRB recommendation "is

¹⁵³ See *In Partnering, a Creative New ADR Concept, Talk and Team Spirit Are the Fundamentals*, *supra* note 49, at 46.

¹⁵⁴ See KNIGHT ET AL., *supra* note 53, § 3:720.

¹⁵⁵ See Geller, *supra* note 2, at 15.

¹⁵⁶ See AMERICAN ARBITRATION ASS'N, *supra* note 111, at 7.

¹⁵⁷ See *id.*

¹⁵⁸ Neutrality of DRB members is discussed above. See *supra* Part II.B.2.

¹⁵⁹ See Frank Carr, *Partnering: Dispute Avoidance the Army Corps of Engineers' Way*, PUNCH LIST, June 1991, at 1, 1.

¹⁶⁰ Crowell & Pou, *supra* note 5, at 189.

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the product of an impartial, mutually acceptable panel's decisionmaking process. Such a decision is hard to reject in good faith."¹⁶¹

Finally, "dispute review boards work!"¹⁶² DRBs resolve disputes that partnering cannot prevent. In virtually every case studied by the American Society of Civil Engineers that used DRBs, the parties to the contract solved all problems at the jobsite.¹⁶³ In addition, there have been very few court challenges to DRB recommendations.¹⁶⁴

IV. RECOMMENDATIONS TO ENSURE THE GOVERNMENT AND CONTRACTOR USE PARTNERING AND DISPUTE REVIEW BOARDS

The Administrative Dispute Resolution Act of 1996 encourages federal agencies to authorize and encourage ADR in their standard contract agreements.¹⁶⁵ Federal agencies should take advantage of the ADRA of 1996 and incorporate the following changes into some of their standardized government construction contract documents.

A. *The Bid Document*

The first step to ensure the parties use partnering and DRBs is to include partnering and DRB provisions in government bid documents. Bid documents should contain a provision that the government encourages the use of partnering.¹⁶⁶ Bid documents also should include DRB provisions.¹⁶⁷ Inclusion of these provisions in the bid documents will alert contractors that dispute prevention and dispute resolution techniques will be used. Because a partnering and DRB clause in the bid document may indicate the government

¹⁶¹ Rubin & Carbajal-Quintas, *supra* note 7, at 448.

¹⁶² *Id.*

¹⁶³ See H. Murray Hohn, P.E., *Dispute Review Boards: What Do They Really Do?*, PUNCH LIST, June 1993, at 5, 5.

¹⁶⁴ See Rubin & Carbajal-Quintas, *supra* note 7, at 448.

¹⁶⁵ See Administrative Dispute Resolution Act § 3, 5 U.S.C. § 471 note (1994) (Promotion of Alternative Means of Dispute Resolution) (amended 1996).

¹⁶⁶ See Robert G. Taylor & Buckner Hinkle, *How to Use ADR Clauses with Standard Form Construction Industry Contracts*, CONSTR. LAW., Apr. 1995, at 42, 42. The notice of opportunity to partner could read: "The [owner] intends to permit the Contractor and its Subcontractors to utilize the Partnering concept for this project. Partnering emphasizes the cooperative approach to problem-solving involving all key parties to the project: Owner, Architect, Contractor and Principal Subcontractors." *Id.* at 43.

¹⁶⁷ See Rubin & Carbajal-Quintas, *supra* note 7, at 447.

is fair and willing to cooperate, a contractor may bid lower because he will not fear the prospect of legal fees for unresolved claims.¹⁶⁸

B. *The Partnering Agreement*

After the contract is awarded, if partnering is used, the parties will attend a partnering retreat.¹⁶⁹ At the end of the retreat, the parties will sign a "partnering agreement."¹⁷⁰ Typically, dispute resolution procedures are not included in this agreement even though a primary reason for the retreat is to discuss dispute resolution methods.¹⁷¹ The contract also should include a DRB provision in the partnering agreement. It is important that stakeholders openly commit to ADR procedures,¹⁷² and thus inclusion of a DRB provision in the partnering agreement promotes this open commitment. Although the partnering agreement is not legally binding on the parties, if DRB procedures are included in the partnership agreement, the parties will be more apt to take the resolution of disputes seriously.¹⁷³

C. *The Construction Contract*

Most importantly, get partnering and DRB provisions in the contract. The time has come to replace generic ADR contract provisions like "the parties agree to arbitrate" or "the parties agree to mediate."¹⁷⁴ Dispute prevention and resolution techniques require more dynamic agreements than those stated above. Partnering and DRB procedures must be incorporated into the contract document.¹⁷⁵ Failure to incorporate these procedures into the contract will require one party to negotiate the contract with the other party at a later time. It is likely that later on the other party may not agree to

¹⁶⁸ See *id.*

¹⁶⁹ See *supra* Part III.B.1.

¹⁷⁰ See *In Partnering, a Creative New ADR Concept, Talk and Team Spirit Are the Fundamentals*, *supra* note 49, at 46.

¹⁷¹ See *id.*

¹⁷² See *Building Success for the 21st Century* (visited Jan. 14, 2000) <http://www.adr.org/rules/guides/partnering_guide.html>.

¹⁷³ See Michael R. DeSilva, *Moving ADR to the Construction Jobsite* (visited Jan 14, 2000) <<http://www.adr.org/pl/plv19n01-1.html>>.

¹⁷⁴ See Thomas J. Stipanowich, *Reconstructing Construction Law: Reality and Reform in a Transactional System*, 1998 WIS. L. REV. 463, 569.

¹⁷⁵ See AMERICAN ARBITRATION ASS'N, *supra* note 111, at 3.

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ADR. Therefore, “[g]et it in the contract!”¹⁷⁶ When using partnering, it is especially important to have a DRB procedure or some back-up ADR procedure in the contract because if partnering fails to avoid disputes, one solution to determine how to remedy the dispute is to rely on the contractual provisions.¹⁷⁷ The contract dispute resolution provision should state the following: (1) how to initiate the dispute prevention or ADR system, (2) which ADR process to use, for example, DRBs, (3) how to select neutrals, (4) a timetable for the DRB procedure, (5) types of procedures to be followed, (6) cost of neutrals, and (7) jointly shared DRB expenses.¹⁷⁸

Below are sample partnering and DRB clauses. The following language is a sample U.S. Army Corps of Engineers partnering clause:

In order to complete this contract most beneficially for both parties, the Government proposes to form a Partnering relationship with the Contractor. This Partnering relationship will draw on the strengths of each party in an effort to achieve a quality project done right the first time, within budget and on schedule. The Partnering relationship will be bilateral and participation will be totally voluntary. Any costs associated with Partnering will be shared equally with no change in contract price.¹⁷⁹

The Corps has alternative partnering clauses that contain similar language to the above.¹⁸⁰ Although the government tends to use a general partnering clause, more detailed clauses are also an option.¹⁸¹

It is equally important to incorporate the DRB clause into the contract. The following is suggested language for a DRB clause:

The Parties shall impanel a Dispute Review Board of three members in accordance with the Dispute Review Board Procedures of the American Arbitration Association. The DRB, in close consultation with all interested parties, will assist and recommend the resolution of any disputes, claims, and other controversies that might arise among parties. When establishing a

¹⁷⁶ John A. Smith, *Construction ADR: You Get What You Put in*, 50 DISP. RESOL. J. 27, 28 (1995).

¹⁷⁷ See AMERICAN ARBITRATION ASS'N, *supra* note 88, at 4.

¹⁷⁸ See Michael R. DeSilva, *Moving ADR to the Construction Jobsite* (visited Jan. 14, 2000) <<http://www.adr.org/pl/plv19n01-1.html>>.

¹⁷⁹ See Appel, *supra* note 81, at 47 (citing U.S. ARMY CORPS OF ENG'RS, IWR PAMPHLET 91-ADR-P-4 (1991)).

¹⁸⁰ See *id.* at 51. For a sample of the American Arbitration Association's partnering clause, see *id.* at 50.

¹⁸¹ See Taylor & Hinkle, *supra* note 166, at 43 (containing a detailed partnering clause).

DRB, the parties need to coordinate it with other dispute resolution procedures required by the contract documents.¹⁸²

The above clause is an example of a very broad DRB provision that does not list specific procedures. The government may want to choose a clause that is more specific as to how the DRB will be used.¹⁸³ Regardless of how broad or specific the DRB clause may be, it must be in the formal contract.

V. CONCLUSION

While most people would agree that "the best dispute resolution is dispute prevention,"¹⁸⁴ it is difficult to prevent all disputes. As this Note points out, partnering cannot always prevent disputes, and therefore it becomes critical to use dispute resolution methods concurrently with partnering, specifically DRBs. Despite the acclaim for partnering, there are too many opportunities for a partnered relationship to fail. For this reason, both federal and state agencies should employ DRBs to resolve construction disputes.

¹⁸² AMERICAN ARBITRATION ASS'N, *supra* note 111, at 3.

¹⁸³ The following is a detailed DRB clause. Where "owner" is used, "government" could be substituted:

(a) A Disputes Review Board is hereby established to assist in the resolution of disputes under this contract. The recommendations of the Disputes Review Board shall not be binding on either the owner or the contractor. The Board shall fairly and impartially consider all disputes and shall provide written recommendations to the owner and the contractor to assist in the resolution of disputes. The Board shall consist of two members, one selected by the owner and one selected by the contractor, who may be employees and/or consultants retained by the party that selected them. The first two members shall select and approve the appointment of a third neutral member, from a list provided by the owner, who shall have no current business or professional relationship with either the owner or the contractor. The owner shall pay the compensation of its representative and the neutral [or the owner and contractor may split the cost of the neutral]. The contractor shall pay the compensation of its representative. The Board shall be kept advised of the status of the Project by monthly reports submitted to the owner.

(b) The contractor shall submit its dispute to the Board within 15 days after the dispute arose by providing its written submission to the Board and the owner. . . . The Board may . . . conduct a hearing on the dispute. . . . [T]he hearing will be conducted at the project site

Richard F. Smith et al., *Dysfunctional ADR: Tips to Avoid the Pain*, CONSTR. LAW., Oct. 1996, at 28, 28.

¹⁸⁴ AMERICAN ARBITRATION ASS'N, *supra* note 88, at 4 (quoting statement made by Commander H.J. Hatch, U.S. Army Corps of Engineers).

GOVERNMENT CONSTRUCTION CONTRACT DISPUTE RESOLUTION

One difficulty in promoting partnering and DRBs is the construction industry's general unawareness of federal agency ADR. This difficulty can be overcome with strategic educational plans.¹⁸⁵ Such plans may include joint government industry seminars and workshops.¹⁸⁶ With increased education, parties hopefully will begin to use DRBs in conjunction with partnering. If both partnering and DRBs are used on government construction contracts, the parties will keep together, work together, and the project will be a success.¹⁸⁷

¹⁸⁵ See American Arbitration Ass'n, *American Arbitration Association Construction ADR Task Force* (visited Jan. 14, 2000) <<http://www.adr.org/taskforce5>>.

¹⁸⁶ See Carr et al., *supra* note 17, at 37.

¹⁸⁷ See *Building Success for the 21st Century* (visited Jan. 15, 2000) <http://www.adr.org/rules/guides/partnering_guide.html>.

